

CHAPTER 20 DEFICIENCIES AND SANCTIONS

CONTENTS

SECTION/SUBJECT	PAGE NUMBER
20.1 INTRODUCTION	20-1
20.2 DEFICIENCIES	20-1
PROCEDURAL DEFICIENCIES	20-1
MAJOR PROJECT DEFICIENCY	20-2
UNRECOVERABLE PROJECT DEFICIENCY	20-3
20.3 SANCTIONS	20-6
20.4 LOCAL ASSISTANCE DISPUTE RESOLUTION PROCESS.....	20-7
DISPUTE RESOLUTION PROCEDURES.....	20-7
IMPLEMENTING THE LADRC'S DECISION	20-8

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CHAPTER 20 DEFICIENCIES AND SANCTIONS

20.1 INTRODUCTION

As outlined in earlier chapters, Caltrans will no longer be involved in most project level reviews and approval activities. The Process Review is now Caltrans' primary method of ensuring that federal and state requirements are met, (see Chapter 19, *Process Reviews*, in the *Local Assistance Procedures Manual* [LAPM]). During a Process Review of a local agencies project files or project site, errors and/or deficiencies could be found. If that happens, federal and/or state funds may be withdrawn from a project depending on the severity and circumstance of the deficiency.

It is important to note that the formal process review is not the only method of discovering project deficiencies. Errors or deficiencies are discovered occasionally as part of the normal routine of processing of project submittals by the District Local Assistance Engineers (DLAEs) or Division of Local Assistance Area Engineers.

This chapter is intended to assist local agencies that are involved in developing local assistance projects by providing examples of the deficiencies that have been found in the past and the possible ramifications for those errors or deficiencies. It should be understood that the examples given are by no means all inclusive. The key to avoiding possible sanctions is to follow the procedures outlined in this manual, the *Local Assistance Program Guidelines* (LAPG), and the *Standard Environmental Reference* (SER), and if you have any questions to consult your DLAE.

Section 20.4, *Local Assistance Dispute Resolution Process*, of this chapter also provides means for local agency to appeal a sanction that they feel has been imposed upon them unfairly or they feel the penalty is too harsh for the error or deficiency. This appeal process is not limited to just the appeal of sanctions; it can be used by local agencies when they are not satisfied with the decision they receive from a district office.

20.2 DEFICIENCIES

PROCEDURAL DEFICIENCIES

A Procedural Deficiency is defined as a finding that a local agency's practices and procedures fail to demonstrate sufficient familiarity for acceptable levels of conformance with procedures and required certifications defined in the LAPM. In addition to jeopardizing federal and/or state funding on completed or ongoing projects, certifications for future projects may be conditioned, or not accepted until the deficiencies are corrected.

Examples of some of the most common procedural deficiencies (found by Caltrans) are:

- Continued submission of Request for Authorization that contains errors and omissions (see Chapter 3, *Project Authorization*, in this manual).
- Continued submission of Preliminary Environmental Studies form that contains errors and omissions (see Chapter 6, *Environmental Procedures*, in this manual).

- Continued submission of Plans, Specifications & Estimate Certifications that contains errors and omissions (see Chapter 12, *Plans, Specifications & Estimate*, in this manual).
- Continued submission of Right of Way Certifications that contains errors and omissions (see Chapter 13, *Right of Way*, and Chapter 14, *Facility Utilities*, in this manual).
- Continued submission of Local Agency Contract Award Checklist that contains errors and omissions (see Chapter 15, *Advertise and Award Project*, in this manual).
- Failure of the local agency to comply with their approved Disadvantaged Business Enterprises (DBE) program, particularly with regard to policy, utilization of DBEs, monitoring, and reporting (see Chapter 9, *Civil Rights and Disadvantaged Business Enterprises*, in this manual).

MAJOR PROJECT DEFICIENCY

A Major Project Deficiency is defined as an error of commission or omission, which violates federal or state law or regulation, and if uncorrected, would prevent federal or state participation in all or a portion of the project.

Examples of some of the most common (found by Caltrans and FHWA) of Major Project Deficiencies (federal) are:

- Failure to initiate an environmental reevaluation after environmental clearance when changes in the scope of the project are proposed, or when new project environmental impacts surface due to changes in law or investigations, shall result in loss of all or part of the federal funding for the project (see Chapter 6, *Environmental Procedures*, in this manual).
- Failure to fulfill mitigation commitments and adherence to restrictions in the environmental document shall result in a loss of all or part of federal funding for the project (see Chapter 6, *Environmental Procedures*, in this manual).
- Right of Way activities in violation of the Uniform Relocation Assistance and Real Properties Policy Act, as amended, can result in all or partial loss of project funding. Project funding losses can result even if there are not federal funds in Right of Way but only in other phases (see Chapter 13, *Right of Way*, in this manual).
- Force Account/Day Labor work, without proper justification, is not reimbursable (see Chapter 12, *Plans, Specifications & Estimate*, in this manual).
- For Emergency Relief (ER) projects, billing for emergency opening but actually doing permanent restoration work can result in a loss of all or part of the federal funding for the project (see Chapter 11, *Disaster Assistance*, in the LAPG)

- In the absence of prior approval documentation, the use of publicly owned equipment, mandatory use of borrow/disposal sites, use of patented/proprietary materials, use of warranty/guaranties, and use of agency-furnished materials, shall make all or part of the construction phase ineligible for reimbursement with federal funds (see Chapter 12, *Plans, Specifications & Estimate*, in this manual).
- Failure to submit a “Material Certificate” shall result in a partial loss of funding for the construction phase. Failure to adequately document and address all exceptions to the certification will result in all or partial loss of reimbursement. Failure to implement an approved materials and testing program for the project will result in the loss of federal funds for the project (see Chapter 16, *Administer Construction Project*, and Chapter 17, *Project Completion*, in this manual).
- Failure to enforce the Contract DBE provisions with regard to utilization, substitution, or good faith determination and documentation will make all, or part of the construction phase ineligible for reimbursement with federal funds (see Chapter 9, *Civil Rights and Disadvantaged Business Enterprises*, in this manual). (*This applies to Contracts executed before May 1, 2006 with race-conscious DBE goals.*)
- Failure to maintain the completed project (roadway and appurtenances constructed with federal funds and/or mitigation sites), or portions of the project shall result in repayment of all or a portion of the federal reimbursement. (See Chapter 18, *Maintenance*, in this manual).

Examples of some of most common (found by Caltrans) Major Project Deficiencies (State) are:

- RTPAs that use Exchange funds for non-Article XIX purposes or for other than projects will have to return the funds given to them (see Chapter 18, *Optional Federal Exchange and State Match Programs*, in the LAPG).
- Counties that use Exchange funds for other the non-Article XIX purposes will have to return the funds given to them (see Chapter 18, *Optional Federal Exchange and State Match Programs*, in the LAPG).
- On Environmental Enhancement and Mitigation (EEM) projects, reimbursable costs must be invoiced for by the end of the first state fiscal year following the fiscal year, during which funds were allocated by the CTC. Failure to comply will result in loss of the federal reimbursement (see Chapter 20, *Environmental Enhancement and Mitigation*, in the LAPG).

UNRECOVERABLE PROJECT DEFICIENCY

An Unrecoverable Project Deficiency is defined as “a deficiency of such magnitude as to create doubt that the policies and objectives of Title 23 of the USC (or other applicable federal codes) will be accomplished by the project,” (quote from “PS&E Certification”) and the project has proceeded to the point that the deficiency cannot be corrected. This level of deficiency shall result in the withdrawal of all, or a portion of the federal and/or state funds from the project.

Examples of some of the most common (found by Caltrans and FHWA) Unrecoverable Project Deficiencies (Federal) are:

- Projects that are not on an approved FTIP/FSTIP are not eligible for reimbursement with federal funds for any project activities prior to approval of the FTIP/FSTIP and project authorization (see Chapter 2, *Financing the Federal-Aid Highway Program*, in the LAPG.)

- Any preliminary engineering, right of way and construction activities done prior to authorization are not eligible for reimbursement (see Chapter 3, *Project Authorization*, in this manual).
 - Violation(s) of permit requirements or conditions obtained as a requirement of the environmental process or failure to secure required permits and environmental approvals will result in a loss of all or part of the federal project funding (see Chapter 6, *Environmental Procedures*, in this manual).
 - No pre-award audit for consultant contracts over \$250,000.
 - Consultant contract awarded, but not through competitive negotiations, when a noncompetitive negotiated contract is not warranted.
 - Design work (over and above what is required for the environmental document) prior to environmental clearance is not eligible for reimbursement with federal funds (see Chapter 3, *Project Authorization*, Chapter 6, *Environmental Procedures*, and Chapter 12, *Plans, Specifications & Estimate*, in this manual).
 - Failure to include required contract provisions, Form FHWA-1273 and other contract provisions - certifications, in the bid documents shall make the construction phase of the project ineligible for federal reimbursement (see Chapter 12, *Plans, Specifications & Estimate*, in this manual).
 - Right of Way Acquisition prior to environmental clearance (except for hardship and protection with FHWA prior approval) is not eligible for federal reimbursement (see Chapter 3, *Project Authorization*, Chapter 6, *Environmental Procedures*, and Chapter 13, *Right of Way*, in this manual).
 - Additional costs resulting from incorrect statements on right of way certification are not eligible for federal reimbursement (see Chapter 13, *Right of Way*, in this manual).
 - Failure to open the bids publicly, failure to read the bids aloud, or failure to discuss reason(s) for not reading bid(s) aloud shall make the construction phase ineligible (see Chapter 15, *Advertise and Award Project*, in this manual).
 - Award of the construction contract to other than the lowest, responsive bidder for bids based on competition shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 15, *Advertise and Award Project*, in this manual).
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- Negotiations with bidder(s) prior to award, except for force account projects, shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 12, *Plans, Specifications & Estimate*, and Chapter 15, *Advertise and Award Project*, in this manual).
 - Award of the contract to a suspended or debarred contractor shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 15, *Advertise and Award Project*, in this manual).

- Failure of a local agency to provide adequate supervision (local agency or local agency's consultant adequately staffed and equipped to provide the construction engineering service required) to ensure the project is constructed in accordance with the plans and specifications, shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 15, *Advertise and Award Project*, in this manual).
- When the local agency hires a consultant to provide construction-engineering services for a project, the local agency is still required to provide a full-time employee of the agency to be in responsible charge of the project. Failure to do so shall make the construction phase ineligible for reimbursement with federal funds (see Chapter 16, *Administer Construction Contracts*, in this manual).
- No public agency shall be permitted to bid in competition or to enter into subcontracts with private contractors (see Chapter 15, *Advertise and Award Project*, in this manual).
- No construction work shall be performed by convict labor at the work site or within the limits of any federal-aid highway construction project from the time of award of the contract or the start of work on force account until final acceptance of the work by the administering agency, unless it is labor performed by convicts who are on parole, supervised release or probation (see Chapter 12, *Plans, Specifications & Estimate*, in this manual).
- Any contract that includes provisions that requires a contractor to give any preference in hiring (with the exception of Indians living on or near a reservation on eligible projects) shall make the contract ineligible for federal reimbursement (see Chapter 12 *Plans, Specifications & Estimate*, in this manual).
- For local agencies that pay for equipment rental above approved equipment rental rates, the local agency will be responsible for the amounts above the approved rates (see Chapter 16, *Administer Construction Project*, in this manual).
- Permanently incorporating steel or iron or coatings thereon from a foreign source in amounts exceeding the minimal use provisions shall make the construction phase not eligible for reimbursement with federal funds (see Chapter 12, *Plans, Specifications & Estimate*, in this manual).
- For maintenance items performed by the contractor as a contract item or under a contract change order, those items shall not be eligible for federal reimbursement (see Chapter 12, *Plans, Specifications & Estimate*, in this manual).
- Payments to a contractor for items of work that was designated for a DBE but performed by others, and there is no documentation for the substitution that was approved, then those items shall not be eligible for reimbursement with federal funds (see Chapter 9, *Civil Rights and Disadvantaged Business Enterprises*, in this manual). (*This applies to Contracts executed before May 1, 2006 with race-conscious DBE goals*).
- Local agencies that do not enforce the requirement that the contractor posts all specified posters, notices, wage determinations, etc. at the job site will lose all or part of their reimbursement (see Chapter 16, *Administer Construction Contracts*, in this manual).

- Local agencies that do not enforce contract requirements, whether express or implied, relating to federal statutes and/or contract provisions pertaining to nondiscrimination, nonsegregated facilities, equal opportunity, health and safety and work site safety, Title VI, Davis-Bacon Act, Copeland Act, Clean Air Act as amended, Federal Water Pollution Control Act, Lobbying Certification, Noncollusion, False Statements, Buy America, On-the Job Training, or incorporating required contract provisions in subcontracts, etc., including reporting shall result in loss of all, or part of the federal reimbursement (see Chapter 12, *Plans, Specifications & Estimate* and Chapter 16, *Administer Construction Contracts*, in this manual).

Some most common examples (found by Caltrans) of Unrecoverable Project Deficiencies (State) are:

- Any capital work (right of way acquisition and construction) done on EEM and projects in advance of CTC's allocation vote is not eligible for reimbursement (see *Financial Guidelines for Local Agency Reimbursement*, in the LAPG).

20.3 SANCTIONS

All Major Project Deficiencies (until they are corrected) and Unrecoverable Project Deficiencies require sanctions by Caltrans. Process Review Committee or DLAE shall impose one of the following sanctions, depending on the severity and circumstances of the deficiency:

- Freeze on all future programming of federal or state funds until corrective action is implemented.
- Freeze progress payments for a federal-aid project until the project's Major Project Deficiency is corrected.
- Percentage of federal or state funds for a project withdrawn.
- All federal or state funds withdrawn from a project.

DLAE will be responsible for notifying the local agency of sanctions imposed.

Whether or not sanctions are imposed against a local agency, the local agency shall be expected to develop an action plan and implement it to correct the deficiencies. Local agencies will be given adequate time to develop and implement their action plan. Failure to correct the deficiencies in a timely manner shall be grounds for imposing additional sanctions.

20.4 LOCAL ASSISTANCE DISPUTE RESOLUTION PROCESS

The Local Assistance Dispute Resolution Process should be used by local agencies to appeal sanctions or when they are not satisfied with the decision they receive from a district office.

The Local Assistance Dispute Resolution Committee (LADRC) was established to consider issues related to locally sponsored projects on the State Highway System (SHS) funded by local sales tax measures (and other local/private sources) and locally-sponsored projects either on or off the SHS funded by federal-aid and/or state funds, such as EEM, TE, CMAQ, RSTP, etc. Issues may include disputes between Caltrans and a local agency regarding : (1) sanctions, (2) invoices, (3) local assistance policy and procedure, (4) cooperative agreement requirements, or (5) any other dispute not covered by existing Intergovernmental Review (IGR) process, Encroachment Permit denial appeal process or Disagreements over project scope, concept and design standards for projects on the SHS.

Members of the LADRC are the following:

- Chief, Division of Local Assistance (chairperson)
- Other members selected by the chairperson. These members will be at or below Chief, Division of Local Assistance level with expertise on the issue.
- Chief Counsel, Legal Division (advisor to the committee)

District Directors are encouraged to establish their own dispute resolution procedure in their district. The LADRC should only be used after the District Director has rendered a decision to a local agency, or the Process Review Committee has imposed a sanction, and the local agency desires to appeal that decision. When this occurs, the “Dispute Resolution Procedures” below should be used.

DISPUTE RESOLUTION PROCEDURES

After an impasse is reached between Caltrans District Director and the local agency, and the local agency desires further Caltrans review of the issue, the following procedures should be used:

1. The local agency shall submit a written request for appeal review to the LADRC chairperson, through the District Director. This is true even for sanctions because the districts are the main focal contact point between Caltrans and local agencies.

The request must fully describe the project issues where there is a disagreement between Caltrans and the local agency. The request should include the following:

- A detailed statement of local agency’s position on the issue.
- Any backup for the position statement, including maps, plans, invoices, agreement(s) (draft and/or executed), pictures, and other material needed to give a full picture of the disputed issue.

2. The district shall forward the local agency's request to the LADRC chairperson, accompanied by a memorandum prepared by the district describing what steps have been taken by the district to resolve the issue(s). The memorandum shall also include the following:
 - An overview of the issue, including any additional maps, plans, invoices, agreement(s) (draft and/or executed), pictures, and other material needed to give a full picture of the disputed issue that was not included in the local agency's request
 - A detailed discussion of the items that are in dispute with references to sections in the manuals and policy memos that support Caltrans' position
 - The district's recommendation on the disputed items

The district will send the memorandum to the LADRC chairperson within two weeks of receipt of the written request from the local agency.

3. The request will be reviewed by the DLA, acting as staff to the chairperson, to determine if LADRC review is needed. DLA will make their determination within two weeks.
4. If sufficient grounds for a meeting are evident, the chairperson will schedule a meeting of the LADRC within two weeks of the decision to convene a meeting.

The appropriate parties (local agency, district representative(s), headquarters representative(s), committee members, and others the chairperson feels appropriate) shall be contacted to attend the meeting. If the chairperson does not find sufficient grounds for a meeting, the chairperson will respond in writing through the district to the local agency why there are not sufficient grounds for the meeting.
5. At the meeting, the local agency and the district representative(s) will be asked to give a brief overview of the project and a discussion of the items in dispute.
6. After all information has been presented and discussed; the LADRC will take the issue(s) under advisement and adjourn the meeting.
7. After evaluating all the information that has been provided, and after consultation with appropriate Deputy Directors and the Director, if necessary; the LADRC chairperson will make a final determination and notify the local agency and the district of the decision in writing within two weeks of the LADRC meeting.

IMPLEMENTING THE LADRC'S DECISION

If the local agency is agreeable to the solution, the district shall work with the local agency to see that the solution is implemented.

If the local agency is not agreeable to the solution, they may drop the issue or pursue further appeal outside of Caltrans. There are no further appeals within Caltrans.